

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE BOARD OF EDUCATION OF THE  
COUNTY OF KANAWHA, a Public Corporation,  
and on behalf of past, present, and future  
students, parents, staff, and teachers,

LISA PERDUE, JENNIFER CAMPBELL and  
JERRI JONES, on behalf of past, present and future  
students, parents and staff and all other interested  
parties, individuals and associations residing or  
located in Fayette County, West Virginia,

THE BOARD OF EDUCATION OF THE  
COUNTY OF POCAHONTAS, a Public Corporation,  
and on behalf of past, present, and future  
students, parents, staff, and teachers,

THE BOARD OF EDUCATION OF THE  
COUNTY OF GREENBRIER, a Public Corporation,  
and on behalf of past, present, and future  
students, parents, staff, and teachers,

THE BOARD OF EDUCATION OF THE  
COUNTY OF MARION, a Public Corporation,  
and on behalf of past, present, and future  
students, parents, staff, and teachers

THE BOARD OF EDUCATION OF THE  
COUNTY OF RANDOLPH, a Public Corporation,  
and on behalf of past, present, and future  
students, parents, staff, and teachers,

Plaintiffs,

v.

WEST VIRGINIA BOARD OF EDUCATION,  
a public corporation; MICHAEL J. MARTIRANO,  
in his individual and official capacity as  
Superintendent of Schools; WEST VIRGINIA  
DEPARTMENT OF EDUCATION; MICHAEL J.  
MARTIRANO, in his individual and official

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CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

CIVIL ACTION NO. 16-C-1267  
(Judge Charles E. King)  
consolidated with the following  
cases:

Civil Action No. 16-C-1268

Civil Action No. 16-C-1269

Civil Action No. 16-C-1270

Civil Action No. 16-C-1271

Civil Action No. 17-C-1247

capacity as Superintendent of Schools Executive Officer; MICHAEL I. GREEN, in his official and individual capacity as President of the West Virginia Board of Education; JOE PANETTA, in his official and individual capacity as Chief Operations Officer for the schools of the State of West Virginia; John Doe, hereinafter to be named,

**Defendants**

**NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA.**

**Intervenor Plaintiff**

**v.**

**THE BOARD OF EDUCATION OF THE  
COUNTY OF KANAWHA, THE BOARD OF  
EDUCATION OF THE COUNTY OF POCAHONTAS,  
THE BOARD OF EDUCATION OF THE  
COUNTY OF MARION, THE BOARD OF EDUCATION  
OF THE COUNTY OF RANDOLPH, and LISA PERDUE,  
JENNIFER CAMPBELL and JERRI JONES, on  
behalf of past, present and future students, parents and  
staff and all other interested parties, individuals and  
associations residing or located in Fayette County, West Virginia  
WEST VIRGINIA BOARD OF EDUCATION,  
a public corporation; MICHAEL J. MARTIRANO,  
in his individual and official capacity as  
Superintendent of Schools; WEST VIRGINIA  
DEPARTMENT OF EDUCATION; MICHAEL J.  
MARTIRANO, in his individual and official capacity as  
Superintendent of Schools Executive Officer; MICHAEL I.  
GREEN, in his official and individual capacity as President  
of the West Virginia Board of Education; JOE  
PANETTA, in his official and individual capacity  
as Chief Operations Officer for the schools of the  
State of West Virginia; John Doe, hereinafter to be named,**

**Intervenor Defendants.**

**ORDER GRANTING NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA'S MOTION FOR SUMMARY JUDGMENT**

On August 28, 2019, came the Plaintiffs, The Board of Education of Kanawha County ("Kanawha County Board of Education"), Lisa Purdue, Jennifer Campbell, and Jerri Jones ("Fayette County Board of Education") The Board of Education of the County of Pocahontas ("Pocahontas Board of Education"), The Board of Education of the County of Greenbrier ("Greenbrier County Board of Education") The Board of Education of the County of Marion ("Marion County Board of Education") and The Board of Education of County of Randolph ("Randolph County Board of Education")("Plaintiffs"), by counsel, Henry Wood, III of the Wood Law Office, L.C.; the Defendants, West Virginia Department of Education, the West Virginia Board of Education, Joe Panetta, Michael J. Martirano, and Michael I. Green ("Defendants") by counsel Victor J. Flanagan and Katie Hicklin of Pullin, Fowler, Flanagan, Brown & Poe, PLLC; and Intervenor Plaintiff National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), by counsel, Don C. A. Parker and Laura E. Hayes of Spilman Thomas & Battle, PLLC for a hearing to consider and act upon National Union's Motion for Summary Judgment ("Motion for Summary Judgment").

Upon consideration of the Motion for Summary Judgment, the arguments of counsel, and the record in this case, the Court does hereby make the following:

**FINDINGS OF FACT**

1. The Plaintiffs each filed a lawsuit against the Defendants on August 18, 2016 and September 1, 2017. The lawsuits bear Civil Action Nos. 16-C-1267, 16-C-1268, 16-C-1269, 16-C-1270, 16-C-1271 and 17-C-1247 ("Underlying Lawsuits"). Amended Complaints were filed in the Fayette County Board of Education lawsuit, the Pocahontas County Board of Education lawsuit,

the Greenbrier County Board of Education lawsuit, and the Marion County Board of Education lawsuit.

2. Each Underlying Lawsuit contains identical allegations against the Defendants.

3. In the Underlying Lawsuits, the Plaintiffs have alleged three causes of action for which they have requested relief. Those causes of action are as follows:

Count I— Violation of Constitutional Rights

Count II—Breach of Statutory Duty

Count III— Negligence and Willful, Wanton and Reckless Acts

4. Counts I, II, and III are each based upon a specific set of facts that allege that the West Virginia Legislature set forth, in West Virginia Code § 18-9A-1 et seq., the statutory scheme for the financial support of the West Virginia school system. According to the Complaints, in order to implement this financial support, the WV Legislature established the School Aid Fund. The School Aid Fund is comprised of (1) the amount raised from local levy on real and personal property; (2) the state foundation aid, which is money the state pays out of general revenue funds to counties based upon a formula containing seven components; (3) state supplemental benefits; and (4) amounts raised locally by special levies by vote of the people in the counties. See *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979). Also, according to the Complaints and Amended Complaints, the West Virginia Legislature set forth a formula that the Defendants were to utilize to determine how the money in the School Aid Fund was to be distributed to school boards throughout the state. The Plaintiffs contend that in 2008 and 2009, the West Virginia Legislature changed the formula and that the Defendants misapplied the formula for the years 2009 through 2015, which allegedly resulted in "\$73.3 million in total errors statewide." These alleged errors led to some school boards allegedly being overfunded while other school boards were allegedly underfunded. In the Underlying Lawsuits, the Plaintiffs are asserting that they were among the school boards that were underfunded.

5. As a result of the alleged underfunding, the Plaintiffs are seeking compensatory damages and equitable damages in the Underlying Lawsuits. Specifically, in the Prayer for Relief in each Complaint and/or Amended Complaint, the Plaintiffs are requesting the Court to issue an order:

A. Declaring the proper manner/application of West Virginia Code Section §18-9A-1 et seq., as it relates to the State Aid funding formula, be clearly identified and appropriate instructions/orders be entered consistent with the legislative report herein identified and constitutional requirements of the State of West Virginia is embodied in West Virginia Constitution Article III, Sections 1 and 10;

B. Enjoining the defendant or defendants from unconstitutionally and statutorily misapplying the school aid funding formula as it pertains to your plaintiff and including requiring/ordering your defendant or defendants or each of them to disburse whatsoever accurate proportion of the total net underfunding amount ( previously herein identified as \$30.1 million) is proper to plaintiff plus interest;

C. Granting your plaintiff separate judgments against the defendants for the full amount of underfunded liability for each of the fiscal years beginning with FY 2009 through FY 2015, plus pre-and post-judgment interest until fully collected. "Plaintiff seeks to collect each yearly underfunded amounts to the extent that each fiscal year's state insurance policy provides coverage during that fiscal year for the alleged misconduct. Plaintiff further asserts that each fiscal years underfunded liability (2009, 2010, 2011, 2012, 2013, 2014, 2015) is a separate occurrence covered under separate insurance policies." *See Pittsburgh Elevator Co. v. West Virginia Bd. of Regents*, 172 W.Va. 743, 310 S.E.2d 675 (1983);

D. Reimbursement of all of plaintiff's costs, expenses, expert expenses, expert fees and attorney's fees pursuant to this court's previous case law, while your plaintiffs' counsel and representatives have been required to pursue this public interest litigation; and

E. Other and further relief as this Court shall deem just and proper as the present case may require.

509-47-07, GL 726-89-30, and GL 957-51-60 ("Policies") provide coverage for the allegations in the Underlying Lawsuits.

11. The Policies each contain five types of insurance coverage, only one of which is relevant to this action: Coverage E—Wrongful Act Liability Insurance.

12. The insuring language of Coverage E states, in relevant part:

A. The Company will pay on behalf of the **"insureds"**, individually or collectively, or their executors, administrators or assignees, in accordance with the terms of this coverage part, all sums which said **"insureds"** shall become legally obligated to pay as damages for a **"loss"** arising from any **"Wrongful Act"** of the **"insured"** [ . . . ]

C. The Company will pay on behalf of the **"Named Insured"**, in accordance with the terms of this coverage part, all sums which the **"Named Insured"** shall become legally obligated to pay as damages for a **"loss"** arising from any **"Wrongful Act"** of the **"Named Insured"** [ . . . ]

13. The following categories of people qualify as **"insureds"** under Coverage E:

A. The **"Named Insured"**,

B. Those persons who were, are now or shall be duly elected or appointed officials, executive officers, commissioners, directors, or members of the **"Named Insured"** while acting within the scope of his duties as such,

C. Any faculty member, employee, volunteer worker or student teacher of the **"Named Insured"** while acting within the scope of their duties as such, but the insurance afforded such individuals does not apply to **"bodily injury"** to another faculty member, employee, volunteer worker or student teacher of the **"Named Insured"** arising out of or in the course of his employment. Employee shall not include any person working on a retainer or contractual agreement.

14. Section 2 under Coverage E of the Policies contains exclusions. Specifically, it states:

## 2. EXCLUSIONS

This insurance does not apply to:

- B. Any claim arising out of the levy, imposition, collection, payment or failure to pay, or refund, of taxes, assessments, fees and charges or the valuation of property for assessment purposes.

15. The Supreme Court of Appeals of West Virginia has held that the phrase "arising out of" is to be given a broad interpretation. *Johnson v. State Farm Mut. Auto. Ins. Co.* 438 S.E.2d. 869, 872 (W.Va. 1993) citing *Baber v. Fortner ex rel. Poe*, 412 S.E. 2d. 814 (W.Va. 1991).

16. Courts have interpreted "arising out of" to mean "originating from," "growing out of," "incident to," or "flowing from." See, e.g., *Capitol Indem. Corp. v. 1405 Assocs., Inc.*, 340 F.3d 547, 550 (8th Cir.2003) ("[U]nder Missouri insurance law, 'arising out of' has been interpreted to be a very broad, general and comprehensive phrase meaning 'originating from' or 'having its origins in' or 'growing out of' or 'flowing from.' "); *Am. States Ins. Co. v. Bailey*, 133 F.3d 363, 370 (5th Cir.1998) ("The words [arising out of] are understood to mean 'originating from,' 'having its origin in,' 'growing out of' or 'flowing from.' " *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 804 (10th Cir.1998).

17. As stated above, the money that the Plaintiffs are alleging was improperly paid to the various West Virginia county Boards of Education is comprised entirely of taxpayer money. Therefore, Plaintiffs' claims "arise out of" the "payment or failure to pay, or refund, of taxes, assessments, fees and charges" and is excluded from coverage under the Policies.

18. In addition, Endorsement 5 of the Policies excludes coverage for the following:

No insurance coverage exists for any and all claims, demands or actions seeking relief in any non-pecuniary form, including but not limited to injunctions, equitable relief, and declaratory judgments, and to any claims, demands, or actions seeking relief in the form of attorney's fees, expenses, or other costs against the insured made in conjunction with, or as a result of, any claim for non-pecuniary relief.

19. Also, Endorsement No. 6 modifies Coverages A, B, C, D, & E and states:

No insurance coverage exists for any and all claims, demands or actions unless the specific demand for relief seeks compensatory or punitive damages (to the extent such punitive damages are allowed under existing law). Non-specific or general demands for judgment or relief, such as "for any other such relief as the court deems just and proper" and other similar types of demands, do not create a duty to either defend or pay under the terms and conditions of this policy.

20. Based upon these exclusions, Plaintiffs conceded that there is no coverage for the relief sought in paragraphs A, B, D, and E of the Prayers for Relief contained within their Complaints and Amended Complaints.

21. Accordingly, National Union Fire Insurance Company's Motion for Summary Judgment is hereby **GRANTED** as to all of the Underlying Lawsuits and all issues presented in this matter have been resolved, and there are no factual issues to be tried by a trier of fact. National Union owes no duty of defense or indemnification to the Defendants in the Underlying Lawsuits.

22. The objections and exceptions of the Plaintiffs are noted and preserved for the record.

23. The Court directs the Clerk of this Court to send certified copies of this order to the following counsel of record:

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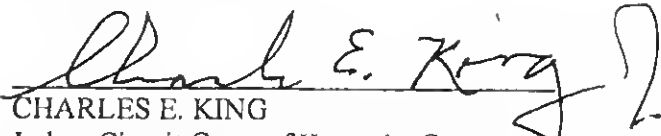


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Lisa Purdue, Jennifer Campbell, and Jerri Jones, The Board of  
Education of the County of Pocahontas, The Board of Education  
of the County of Greenbrier, The Board of Education of the County  
of Marion, and The Board of Education of County of Randolph*

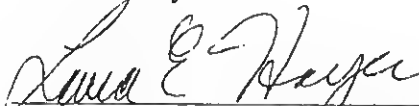
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ENTERED this 19<sup>th</sup> day of Sept., 2019.

  
CHARLES E. KING  
Judge, Circuit Court of Kanawha County

Submitted by:

  
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